STATE OF MICHIGAN

COURT OF APPEALS

LINDA TATE, Plaintiff-Appellant,	UNPUBLISHED May 30, 2013
v	No. 307963 Wayne Circuit Court
PLASTOMER CORPORATION, Defendant-Appellee.	LC No. 10-011290-CD

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting defendant summary disposition of plaintiff's employment discrimination claim. We affirm.

Plaintiff was originally hired by defendant in 1999. She was working full-time as an administrative assistant in the human resources department in 2008 when defendant, due to economic conditions, laid off a significant portion of its workforce. In particular, all of the human resources department, including plaintiff, was laid off, with the exception of the director, David Groenewoud, who was placed on part-time status and lost his medical benefits.

In January 2009, defendant offered to recall Debby Winnicker to a part-time position in the department. Winnicker also served as an administrative assistant in the human resources department and was laid off with plaintiff in 2008. In January 2009, plaintiff was on disability leave and unable to return to work. In February, she contacted defendant and was offered a part-time position without medical benefits. She declined the offer. The same offer was extended in November 2009, which she again declined. She then filed a claim with the Equal Employment Opportunity Commission for race and disability discrimination. After that claim was denied, she filed the instant complaint, alleging racial discrimination, racial and sexual harassment, breach of an implied employment contract, and discharge against public policy. Defendant moved for summary disposition under MCR 2.116(C)(10), no genuine issue of material fact, which the trial court granted.

Plaintiff first argues that the trial court erred in concluding that she had failed to establish a claim for race discrimination under the Elliott-Larsen civil rights act, MCL 37.2101 *et seq*. We disagree. We review a summary disposition decision de novo. *St Clair Med PC v Borgiel*, 270 Mich App 260, 263; 715 NW2d 914 (2006). A summary disposition motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 263-264.

To establish a prima facie claim of racial discrimination, plaintiff must establish, *inter alia*, that "others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). Plaintiff is unable to make this showing because, with the exception of the department director, all members of her department were laid off. At best, plaintiff can show that Debby Winnicker received slightly more favorable treatment. First, Winnicker stayed on an additional two days longer in order to assist the director in some insurance matters. But the evidence demonstrated that plaintiff was unavailable to work on one of the two days because of a doctor's appointment. This evidence sufficed to negate that defendant's selection of Winnicker constituted impermissible bias. And although Winnicker was recalled to work approximately a month before plaintiff, plaintiff declined precisely the same recall offer because it was only part-time and did not include benefits. Plaintiff has proffered no evidence that she would have accepted that offer had it been made a month earlier. In sum, plaintiff cannot show that she was treated less favorably than other employees in her position.

Next, plaintiff argues that the trial court erred in granting summary disposition of her hostile work environment claim. Plaintiff alleges that there were a number of incidents that created a hostile work environment, one in 2003 and the remainder in 2008. With respect to the 2003 incident, it is outside the three-year period of limitations. *Meek v Mich Bell Tel Co*, 193 Mich App 340, 344; 483 NW2d 407 (1991).

As for the 2008 incidents, plaintiff did not make a complaint about any of the incidents. The need for such notice was explained in *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000):

> When the submission to or rejection of the unwelcome sexual conduct or communication has *not* been factored into an employment decision, but a hostile work environment has nevertheless been created because unwelcome sexual communication or conduct substantially interferes with an individual's employment, the violation can only be attributed to the employer if the employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment.

Plaintiff argues that, while she had not filed a complaint, defendant received constructive notice because Groenewoud, as human resources director, should have known that the communications amounted to sexual harassment. Indeed, constructive knowledge of sexual harassment can be established by a showing of the pervasiveness of the harassment. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 627; 637 NW2d 536 (2001). Given the disparate and minimal nature of the alleged incidents in this case, we cannot say that they were "substantially pervasive enough to infer that defendant had notice of [them]." *Id*. Plaintiff has not established a genuine issue of material fact concerning defendant's constructive notice of any harassment.

Plaintiff next challenges the trial court's finding that she failed to rebut defendant's claim that legitimate, non discriminatory reasons warranted her termination. According to plaintiff, defendant's stated reasons for her lay-off qualified as purely pretextual. A plaintiff can establish pretext by substantiating that the proffered reasons for an adverse employment action (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to

justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). Plaintiff has produced no evidence rebutting that the lay-offs in her department were motivated by the economic down-turn. Accordingly, no question of material fact exists upon which reasonable minds could differ regarding the true reason for plaintiff's lay-off.

Finally, plaintiff argues that the trial court erred in dismissing her claims that the discharge was against public policy. This Court summarized the public-policy exception to the principle of employment at will in *Lewandowski v Nuclear Mgt Co, LLC*, 272 Mich App 120, 127; 724 NW2d 718 (2006):

> In *Suchodolski* [*v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982)], our Supreme Court found that although employment in Michigan was generally at will, an employee could bring suit for wrongful discharge if the grounds for discharge violated public policy. It noted that public policy is violated when (a) a statute specifically prohibits the discharge, (b) the employee is discharged for refusing to violate the law, or (c) the employee is discharged for exercising a well-established statutory right. *Id.* at 695-696. The first prong involves an express cause of action, while the second and third prongs involve implied causes of action. *Id.* However, if a statute provides a remedy for a violation of a right, and no common-law counterpart right exists, the statutory remedy is typically the exclusive remedy. *Dudewicz v Norris Schmid, Inc*, 443 Mich. 68, 78; 503 NW2d 645 (1993). Moreover, an employee has no common-law right to avoid termination when he or she reports an employer's violation of the law. *Id.* In other words, a public-policy claim may only be sustained if there is no applicable statute prohibiting retaliatory discharge for the conduct at issue. *Id.* at 80.

In the case at bar, there are statutes addressing plaintiff's claims. Accordingly, any relief must be obtained through those statutes, not through a claim that her discharge was against public policy.

Affirmed. Defendant may tax costs.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Karen M. Fort Hood